



Kavilu & another v Ndoro & 2 others (Environment & Land Case 44 of 2023) [2025] KEELC 3554 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3554 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 44 OF 2023
FM NJOROGE, J
APRIL 30, 2025**

BETWEEN

JIMMY ROD KAVILU 1ST PLAINTIFF

JOSEPHINE MWIKALI KAVILU 2ND PLAINTIFF

AND

LAWRENCE KAZUNGU NDORO 1ST DEFENDANT

HANIF IQBAL SHERBRAZ 2ND DEFENDANT

PRISCA MUSA ANUDA 3RD DEFENDANT

JUDGMENT

The Claimn

1. The present suit was commenced by way of a plaint dated 17/11/2023 in which the 2 Plaintiffs sought the following reliefs against the Defendants: -
 - a. An order for eviction of the defendants, their agents/servants, employees, or any other person claiming to act on their behalf/authority from land Plot Number 284/16 Subdivision No 698/III/Mainland And North-kanamai Area;
 - b. A permanent injunction against the 1st and 2nd Defendants, their agents/servants, employees, or any other persons claiming to act on their behalf/authority from disposing, leasing, using and or giving out land plot number 284/16 Subdivision No 698/III/Mainland North-kanamai Area or in any in way interfering with the quiet possession and or enjoyment of the plaintiffs over the same land;
 - c. A permanent order of injunction against the 2nd Defendant from executing the terms of the illegally obtained lease agreement dated 19th May 2020;



- d. An order of termination of the lease agreement dated 19th May 2020 between the 1st and 2nd defendants;
 - e. A permanent order of injunction against the 3rd defendant stopping her from trespassing through the land plot number 284/16 Subdivision No 698/III/Mainland North- Kanamai Area and from proceeding with construction of a perimeter wall and other structures on the suit land;
 - f. An order of the court directing demolition of the perimeter wall and all other structures constructed by the 3rd defendant on the suit property.
 - g. General Damages for trespass and breach of the plaintiff's constitutional right to own property and have quiet enjoyment;
 - h. Special damages for destruction of the plaintiff's property, most especially their cottage which has since been vandalized by the Defendants and/or their authorized agents;
 - i. Cost of the suit and interest at court rate;
 - j. Any other relief this honourable court may deem fit to grant.
2. The plaintiffs claim that they are the registered owners of Plot Number 284/16 Subdivision Number 698/III/MN - KANAMAI having purchased the same from one Mr. Mohamed Ahmed Umlai in 1986. They aver that they followed the due process in the acquisition of the land; they then developed the land by building a cottage thereon. Later, they employed the 1st defendant as a caretaker but he ceased working for them in 1999. However, before leaving service, the 1st defendant had in 1998 purportedly obtained a letter of allotment in his name from the Commissioner of Lands over the suit land. The plaintiffs aver that by 1998 the suit land was not public land capable of being allocated to the 1st defendant. The 1st defendant then purported to enter into a lease agreement dated 19th May 2020 with the 2nd defendant in respect of the suit land by virtue of which the 2nd defendant was allowed to extract murrum from the suit land.
 3. The 3rd defendant is said to have filed a suit at Kilifi being ELC Case Number 046 of 2022 (hereinafter also referred to as "the Kilifi suit") against 3 persons who included the 1st and 2nd defendants in the present suit. In the Kilifi suit however, the land is also referred to as Plot Number 689/MN/III but it is said to measure 100 by 100 ft. and so the dimensions differ from those of the plaintiffs' parcel of land here in, which are, according to the certificate of title, 0.7838 ha, a much bigger parcel. That notwithstanding, using orders obtained in the Kilifi case, the 3rd defendant has encroached onto the suit land referred to in the present case. The plaintiffs aver that the defendants have committed acts of waste on the suit premises, and have also denied the plaintiffs quiet possession and utilization of the suit land thereby infringing the plaintiffs' constitutional right to own property. The plaintiffs' cause of action therefore is based in fraud and trespass hence the prayers.

Defences

1st Defendant's Defence.

4. The 1st defendant never filed any defence to the claim. However, he was present and watching as the case of the 3rd defendant proceeded but he never testified since he did not file defence. He also declined to cross-examine the 3rd defendant despite being invited by court to do so.



2nd Defendant's Defence.

5. The 2nd defendant never entered appearance and never filed any defence in the suit.

3rd Defendant's Defence.

6. The 3rd defendant filed her defence in the matter denying the plaintiffs' claim and asserting that she legally purchased the suit land, which she also referred to as "Plot number 698/MN/III", from the 1st defendant for the consideration of Kshs 1,250,000/- vide 2 agreements dated 30th July 2019 and 9th October 2019.

Evidence Of The Parties

Evidence for The Plaintiffs

7. At the hearing, the 2 plaintiffs testified and adopted their written witness statements as their evidence-in-chief in the case, and they were cross-examined by counsel appearing for the 3rd defendant. Their evidence closely followed the particulars set out in the plaint.

Evidence for the defence.

8. Of all defendants, only the 3rd defendant gave evidence at the hearing. Her evidence rhymed with the contents of her defence which has been analyzed herein above.

Submissions

9. After the hearing the court ordered parties to file submissions. I have scrutinized the CTS for any submissions of the parties and found none.

Analysis And Determination

10. The plaint is clear that the claim against all the defendants is for trespass on the plaintiff's land. As they never gave any evidence, the plaintiffs' evidence is not controverted by the 1st and 2nd defendants.

11. The issues arising for determination herein are as follows:

- a. Who is the rightful owner of the suit land?
- b. Whether the defendants have trespassed onto the suit land;
- c. What orders should issue.

The issues are addressed as herein under.

12. Through PW1, the plaintiffs produced their certificate of title issued on 21st August 1984 in evidence; attached thereto was a Deed Plan dated 23/7/1984. Endorsed on the said title is an entry regarding transfer to the plaintiffs dated 18/9/1986. The two last entries on the title dated 2/10/86 (Entry 3) and 18/3/87 (Entry 4) respectively are a Charge and a Further Charge to Grindlays Bank International Kenya Limited which bank the 1st plaintiff is said to have worked for. The court was shown the original of the certificate of title as well as the transfer from Mohamed Ahmed Umlai registered on 18th September 1986 in favor of the plaintiffs. Two certificates of postal search dated 5th September 2023 and 11th November 2021 were produced in evidence by PW1. The plaintiffs also produced correspondence dated 4/8/1986 and 7/8/1986 which showed that the 1st plaintiff applied for a loan from the bank



- that he worked for to facilitate purchase of land and that the loan was approved vide the latter letter. Correspondence between the 1st plaintiff, the bank and A.B. Patel & Patel Advocates, the legal firm that handled the transaction (including the registration of a legal charge in favour of the bank over the suit property) was also exhibited, just as was the charge document on whose the endorsed registration date matches with that on Entry No 3 on the face of the certificate of title produced by the 1st plaintiff; the charge expressly states that the suit land is held as security for advancement of monies to the plaintiffs.
13. A copy of a Further Charge dated 9/3/1987 was also produced on which the registration date matches that on Entry No 4 on the certificate of title produced by PW1. Letters of consent in favour of the sale transaction and the charge transaction, dated 28/8/86 and 25/9/86 respectively were also produced. A copy of a transfer from Mohamed Ahmed Umlai to the plaintiffs dated 18/9/1986 was also produced. Its date of registration matches the date of the transfer endorsed on Entry No 2 in the certificate of title produced, and this court has no doubt that that entry refers to it.
 14. According to the plaintiffs the 1st defendant purported to secure a letter of allotment in respect of the suit land in 1988 while he was still their employee. A copy of the purported letter of allotment issued to the 1st defendant was exhibited by PW1. It is dated 24/2/1998, a date occurring long after title was registered and issued in the name of Mohamed Ahmed Umlai and also after its transfer to the plaintiffs. It is the same document relied on by DW1 in respect of her sale transaction with the 1st defendant. It is also the letter of allotment expressly referred to in her sale agreement with the 1st defendant dated 30/7/2019. That agreement has an undertaking by the 1st defendant that he would deliver title and other documents to the 3rd defendant within 90 days of the date of the agreement's execution, which according to the evidence of the 3rd defendant, never occurred. The agreement also stated that should the transaction fail, the vendor has thereby undertaken to refund Kshs. 700,000/- "together with a penalty of 10%." The other agreement between the 3rd defendant and the 1st defendant is illegible in for the greater part save the date which is reflected thereon as 9/10/2019.
 15. A copy of a lease agreement between the 1st and 2nd defendant was also produced in evidence by the plaintiffs. By the lease agreement, the 2nd defendant is mandated to operate a quarry on the suit land as well as on plot nos MN/III/699 and MN/III/700 for a period of 40 years with effect from 18th May 2020. No details have been given regarding the other two plots involved. Not even a letter of allotment showing that the 1st defendant had purportedly been allocated the same was produced by the defendants.
 16. The letter of allotment dated 24/2/1998 and the lease dated 19/5/2020 have not been denied by the defendants in the present suit. However, this court finds it curious that no application for allotment of the land to the 1st defendant has been exhibited, and that no further action after the purported allotment is demonstrated to have been undertaken in pursuit of title by any of the defendants in their respective names. Also, the postal search certificates produced by the plaintiffs show that as at 11/11/2021 and 5/9/2023 respectively, the land was still registered in the plaintiffs' names as joint tenants.
 17. The 3rd defendant gave evidence in the matter and adopted her witness statement dated 11th March 2024 as part of her evidence-in-chief. Her evidence is that she purchased the suit land from the 1st defendant. The agreement was executed before an advocate. It is dated 30th July 2019. She paid Kenya Shillings 700,000/- at first then paid a further Kenya Shillings 50,000/-, and finally paid Kenya Shillings 500,000/- to the 1st defendant. After the last payment the 1st defendant was supposed to avail the 3rd defendant with a title deed but he never did so. However, the 3rd defendant took possession of the suit land after 6 months and began constructing a security wall around it. The plaintiff's evidence



confirmed the existence of that wall, which is evidence of the 3rd defendant's interference with the suit property.

18. According to the 3rd defendant's further evidence in cross-examination, she had never seen the plaintiffs before the present suit. She relied solely on the 1st defendant's letter of allotment to purchase the suit property as he had no registered title, and he undertook to avail her title later. Her further evidence is that the 1st defendant informed her that the title to the suit land was being processed, and so she purchased the land while it had no title in the 1st defendant's name. However, to date the 1st defendant has never availed the title to her. When further cross-examined by Mr. Oloo for the plaintiffs, she admitted that in her written witness statement she has alleged that the 1st defendant invaded the suit land using hired goons; that at one point the 1st defendant had leased the land to Hanif Iqbal Khan (the 2nd defendant). She admitted to having filed the Kilifi case against the 1st and 2nd defendants.
19. Upon perusal of the documents in the present case I find that all the parties herein have claimed the same land parcel on the ground. The suit land goes by the reference Plot No 698/Section III/MN. It is apparent from the plaintiffs' title that it is a subdivision of the Original Plot which was Plot Number 284/16. No history of that original parcel has, much to the disadvantage of this court, been given by any of the parties, though, on the material presented this court is capable of disposing of the present suit and the issues arising strictly as between the parties named herein.
20. The 1st defendant, under whom the rest of the defendants have claimed, only has a letter of allotment and this court finds it to be of dubious origin since it was not corroborated by any other records from the Ministry of Lands Headquarters where such letters are often issued from. He has no registered title to the suit land. Besides, even if it were assumed for argument's sake that the letter of allotment was authentic and was issued in respect of the suit land herein by the government, the date thereon shows that by the time of its issuance the suit land had already been allocated to another person who had already transferred it to the plaintiffs; consequently, it is correct for the plaintiffs to state, as they do, that by the time of the issuance of that letter of allotment the suit land was not government land but private land and it was therefore not available for allocation to any person by the government. Only the plaintiffs could transact with the title thereto. Section 25 and 26 of the [Land Registration Act](#) provide as follows:
 25.
 - (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
 - (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26.



- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
 - (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
21. No evidence of the extenuating factors set out in Section 26(a) and (b) has been adduced by any of the defendants in the present case as against the plaintiffs so as to cast doubt on the authenticity of the plaintiffs' title to the suit land.
 22. As between the parties in the present case, I find that it is the plaintiffs who have established their claim to title over the suit land on a balance of probabilities. I also find that the defendants are mere trespassers on the suit land and that the 1st defendant, without any right or interest in the suit land, fraudulently attempted to lease out the land to the 2nd defendant and to sell the same to the 3rd defendant.
 23. The upshot of the foregoing is that the plaintiffs' claim against all the defendants succeeds. I therefore issue the following final orders:
 - a. Prayers Nos (a) (b) (c) (d) (e) and (f) and (i) in the plaint dated 17/11/2023 are granted in favour of the plaintiffs against the defendants as prayed therein;
 - b. Prayer No. (g) in the plaint dated 17/11/2023 is granted only to the extent that the plaintiffs are hereby awarded nominal damages of Kshs 600,000/- against all the defendants jointly and severally for their trespass upon the suit property;
 - c. Special damages prayed in Prayer No. (h) in the plaint dated 17/11/2023 are not awarded as they were not specifically pleaded and proved by both plaintiffs as required by law;
 - d. The damages awarded in (b) herein above shall attract interest at court rates until settled in full.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 30TH DAY OF APRIL 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

